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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SAN JOSE CONSTRUCTION CO., INC.,

Plaintiff and Appellant,

v.

RICHARD FOUST et al.,

Defendants and Respondents.

H034841

(Santa Clara County

Super. Ct. No. 1-04-CV017128)

Plaintiff San Jose Construction Co., Inc., sued its former employee, Richard Foust, and Foust's new employer, S.B.C.C., Inc. (South Bay), for trade secret misappropriation. (Civ. Code, § 3426 et seq. [Uniform Trade Secrets Act (UTSA)].) It asked a jury for an award of \$1,355,660 based on alternative theories: lost profits (from Foust); unjust enrichment (from South Bay). The jury found that defendants had misappropriated plaintiff's trade secrets but it awarded no damages. The trial court therefore rendered a judgment for defendants. On appeal, plaintiff contends that (1) the jury erred by failing to award damages against South Bay for unjust enrichment, and (2) the trial court erred by denying its motion to amend to conform to the proof at trial that supported a claim of breach of fiduciary duty against Foust. We affirm the judgment.

SCOPE OF REVIEW

Insofar as plaintiff's unjust-enrichment claim is concerned, plaintiff argues in the double negative: "No evidence, let alone substantial evidence, shows that South Bay was not unjustly enriched." Later, after extensively detailing Foust's misappropriation (an

undisputed fact given the jury finding) and other claimed transgressions not relevant to the issues on appeal, it reiterates: “No evidence--none--supports the proposition that South Bay derived no benefit from Foust’s misdeeds.”

“We generally apply the familiar substantial evidence test when the sufficiency of the evidence is at issue on appeal. Under this test, ‘we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment ‘In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*’ [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.” ’ [Citation.]

“But this test is typically implicated when a defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact’s unassailable conclusion that the party with the burden did not prove one or more elements of the case (*Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 742 [trier of fact is the exclusive judge of the credibility of the evidence and can reject evidence as unworthy of credence]; *Hicks v. Reis* (1943) 21 Cal.2d 654, 659-660 [trial court is entitled to reject in toto the testimony of a witness, even if that testimony is uncontradicted]).

“Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was

insufficient to support a finding.’ ” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.)

Here, plaintiff had the burden to prove that South Bay was unjustly enriched. The jury concluded that South Bay failed to carry this burden. Thus, the question on appeal is whether the evidence compels an award for unjust enrichment as a matter of law--not whether no evidence supports that South Bay was not unjustly enriched.

BACKGROUND

“[Plaintiff] and South Bay are local competitors in the business of commercial construction. . . . Foust was [plaintiff’s] project manager He directed all phases of construction from the preliminary design to the closeout of a project; in most cases he was the ‘interface’ between the [project’s] owner and [plaintiff].” (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1531, fn. omitted [summary judgment for South Bay in this case reversed].)¹

The projects interfaced by Foust that are relevant here were negotiated bids. In a negotiated bid, a project’s owner chooses a contractor who calculates fixed costs, quotes a fee, obtains bids from subcontractors, chooses subcontractors, and makes a job proposal. This process requires the contractor to be involved with the plans and specifications, architectural changes, public agency changes, materials upgrades or downgrades, and the like. The process allows a project owner a certain measure of cost certainty. Though the contractor risks doing the preconstruction work for nothing in the event that the owner does not contract to build, the preconstruction work gives a contractor the advantage of being on the ground floor of the project by possessing up-to-date, ready-to-go information--a position akin to the owner’s partner.

¹ We quote here and later from our prior opinion. We are mindful that the quotes are from the summary judgment record rather than the trial record. We use the summary judgment record as a convenient way to summarize general background material that is not central to the issues on appeal.

In February 2003, Tom Biagini brought the Ross-Hillsdale retail center project to plaintiff for preconstruction work because he wanted Foust to be his project manager.

In Spring 2003, Ralph Borelli brought the Ringwood Court office condominium project to plaintiff. Based on a previous experience with plaintiff and Foust, he made known that he wanted Foust to be the project manager. He brought the Airtech office condominium project to plaintiff shortly thereafter and referred the owner of the Operating Engineers office building project to plaintiff in January 2004.

In late 2003 or early 2004, Mauricio Mejia met Foust through a mutual friend and asked him for a proposal for the Vault remodeling project.

On March 12, 2004, Borelli told Foust that he was taking the Ringwood Court, Airtech, and Operating Engineers projects to another contractor because plaintiff would not assign Foust as project manager and was planning to fire him in any event. Borelli suggested that Foust contact South Bay for a job. Foust contacted South Bay and two other contractors. He also told Biagini and Mejia that he was leaving plaintiff's employ. He then began copying plaintiff's files on Borelli's three projects from plaintiff's computer onto diskettes. Thereafter, Mejia and Biagini told Foust that they wished him to be in charge of their projects and Foust copied plaintiff's files on their projects.

Foust accepted an employment offer from South Bay on March 26. "The downloaded information was then uploaded onto the South Bay system and copies of documents were placed in project binders. Of these projects, three were ready to go, and two had an anticipated start time in May. The documents Foust took to South Bay included project budgets and proposals made to the owners, correspondence between owner and architect, all subcontractor bids, cost estimates, requests for information by subcontractors or project managers, and responses to those requests from the owner or architect. Thus, by the end of March 2004 Foust had everything he needed to begin work right away on at least three projects for South Bay." (*San Jose Construction, Inc. v. S.B.C.C., Inc.*, *supra*, 155 Cal.App.4th at p. 1531.)

On March 29, 2004, Foust finalized an employment agreement with South Bay. He began work the next day. Plaintiff then officially fired him and demanded that he return its files. Plaintiff filed this action on April 2, and Foust returned the files by April 5.

Plaintiff's trial expert opined that plaintiff lost profits on the five projects as follows: Ringwood Court--\$539,085; Operating Engineers--\$212,312; Ross-Hillsdale--\$207,556; Airtech--\$334,186; The Vault--\$62,521. He added that South Bay was unjustly enriched by like amounts given the similarity of plaintiff's and South Bay's bids.

Plaintiff argued to the jury: "The result of all this wrongful conduct and deception, of course, was that [plaintiff] lost the profits and the marketing opportunities that went along with building the project and South Bay unfairly gained them or was unjustly enriched as the term will be in the instructions. Unjustly enriched encompasses both lost profits and the lost marketing opportunities."

Defendants argued that "the alleged lost profits or unjust enrichment were caused by one thing, and that's [plaintiff's] decision to change out Rick Foust as their project manager and bear the risk of that decision."

The trial court instructed the jury on the burden of proof and that plaintiff had the burden to prove that (1) South Bay was unjustly enriched, and (2) the improper use of plaintiff's trade secrets was a substantial factor in causing South Bay to be unjustly enriched. It then specifically instructed as follows: "If [plaintiff] proves that South Bay . . . misappropriated its trade secrets, then [plaintiff] is entitled to recover unjust enrichment from South Bay [¶] South Bay . . . was unjustly enriched if its misappropriation of [plaintiff's] trade secrets caused South Bay to receive profits and the value of marketing opportunity it otherwise would not have achieved."

The jury returned a special verdict finding that (1) South Bay had improperly used plaintiff's trade secret, and (2) South Bay was not unjustly enriched.²

Plaintiff moved for a new trial and judgment notwithstanding the verdict. It argued: "[T]he use of these trade secrets is what enabled South Bay . . . to actually enter into the contracts with the owners to commit to the pricing, to agree to begin construction immediately. Those are things which only could happen with the use of [plaintiff's] trade secrets, and that was also explained and supported, and there's not really any evidence in the record to contradict that fact. . . . [¶] So there isn't any dispute that [plaintiff's] trade secrets were actually used as well, and there is no other conclusion possible under the evidence except that South Bay at least was unjustly enriched to the extent of obtaining these contracts and doing this work by the use of [plaintiff's] trade secrets."

When defendants misconstrued plaintiff's argument, the trial court crystallized the issue: "[T]he plaintiffs are [*sic*] not saying that there was no evidence regarding the owners' interest in having Rick Foust be their project manager. That was pretty clear. There's evidence of that all over the record here. [¶] What they're saying, as I understand the argument, is that in addition to Rick Foust, they wanted the projects to go forward in a very timely fashion and they wanted it to be competitively priced with what had been going on during the time that Foust was with [plaintiff]. Those are the two things that I think that they're adding to the equation, not just that they wanted Rick Foust. [¶] And I think, as I understand your argument, your argument is in no way, shape, or form, based upon the evidence, was [plaintiff] ever going to get these projects period. So, in other words, even if they didn't end up at South Bay, they were not going back to [plaintiff] because of the feelings that the owners expressed during the course of the trial. . . . [¶] . .

² The jury also found that (1) Foust had improperly used plaintiff's trade secrets, (2) plaintiff lost profits and/or marketing opportunities, and (3) Foust's improper use of the trade secrets was not a substantial factor in causing plaintiff to lose profits and/or marketing opportunities.

. [¶] Mr. Borelli's strong feelings about not wanting to deal with [plaintiff's principal] and then the other people either taking leave from Mr. Borelli or indicating in testimony that they had no connection with anybody other than Foust at [plaintiff], et cetera. [¶] So, in other words, as I understand your argument, your argument is [plaintiff], when Foust left, they were not ever going to see those projects ever again, and so whether it became South Bay's projects or some other construction company projects was what is in the mix, and I think what the plaintiffs are arguing is that the idea was that the--there was acknowledged misappropriation, there was some indication of use, although that was not as clear, but there was some acknowledgment of use of the trade secrets or the compilation, which is the trade secret that we're talking about here. [¶] But the importance of timing and price seems to be where the two sides seem to be parting ways in terms of the significance of what happened after Foust left and went to South Bay and the owners of the projects followed him and contracted with South Bay. That seems to be number one. [¶] And [plaintiff] has twice now said during oral argument that at the very least, there's an unjust enrichment analysis that goes toward South Bay's ending up with the projects by virtue of the misappropriation and use of the compilation, that that was all tied in to this timing and price in addition to the idea of Mr. Foust being the project manager."

The trial court denied both motions. In denying the motion for a new trial, it explained: "Here the position Plaintiff was in before Defendant did anything 'wrong,' was that it had fired Foust and had no chance of getting the project contracts. Because Plaintiff cannot show that the jury should have found that it had any chance at getting the contracts after it fired Foust, it cannot show that Defendant (or anyone else) getting the contracts for the projects was unjust enrichment. At best, Plaintiff can argue that Defendant should not have gotten the contracts because the supposedly express conditions that the schedule and budget not change could only be achieved by using

misappropriated material, but that does not change the fact that Plaintiff had forever taken itself out of the running by firing Foust.”

UNJUST ENRICHMENT

As is apparent from the above, this case was the usual one posing evidentiary conflicts, conflicting inferences from undisputed facts, and competing evidence. In reiterating its arguments from below, the closest plaintiff comes to arguing that it was entitled to unjust enrichment as a matter of law is the succinct claim that “The jury specifically found that South Bay improperly used [plaintiff’s] trade secrets. Reversal follows from that finding, because it cannot be denied that South Bay benefited from what it used.” Plaintiff relies on *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, for this proposition. There, we stated: “ ‘In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.’ ” (*Id.* at p. 628.)

Plaintiff’s analysis is erroneous. And it overlooks the jury instructions.

It may be true that, in a given case, a benefit received by a defendant without a corresponding loss to the plaintiff would nevertheless constitute unjust enrichment. But the jury in such a case must still make the factual determinations that the benefit received was “unjust” and “enrichment.” (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 346 [“ ‘[A]n individual may be required to make restitution if he is unjustly enriched at the expense of another. [Citation.] A person is enriched if he receives a benefit at another’s expense.’ ”].)

Here, South Bay did not benefit at plaintiff’s expense--South Bay benefited from an opportunity that plaintiff had spurned by firing Foust. Thus, the verdict is entirely consistent with reasoning that it was not “unjust” or “enrichment” for South Bay to benefit from the spurned opportunity.

Moreover, the trial court instructed the jury that South Bay was unjustly enriched if its misappropriation of plaintiff's trade secrets caused South Bay to receive profits it otherwise would not have achieved. This instruction, together with the burden-of-proof instructions, indisputably asked the jury to determine whether plaintiff proved facts, namely a receipt of profits, that South Bay otherwise would not have achieved. The jury's verdict specifically found that plaintiff had failed to prove those facts. As we have explained, we do not revisit a jury's finding that a plaintiff failed to carry the burden of proof.

We nevertheless observe that the verdict is entirely consistent with accepting defendants' evidence that South Bay achieved the profits justly because it had hired Foust after plaintiff had fired Foust. Plaintiff's evidence to the contrary about South Bay having scheduling and budget data in hand at the outset of Foust's employ is of no moment given that the jury implicitly rejected its significance.³

MOTION TO AMEND

After our reversal, plaintiff filed a first amended complaint that alleged causes of action against Foust for breach of loyalty and breach of fiduciary duty. The trial court sustained Foust's demurrer without leave to amend on the ground that, under the UTSA, plaintiff's cause of action for misappropriation of trade secrets superseded the causes of action for breach of loyalty and fiduciary duty because the latter causes of action were based on the same nucleus of facts as the former cause of action. It explained: "The

³ Under the UTSA, "If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited." (Civ. Code, § 3426.3, subd. (b).) "A measure of damages may not be provable for lack of sufficient evidence. Or it may not be proved, as happened here, where the jury concludes that the defendant did not profit from its wrongdoing. Either way, it is not provable for purposes of [Civil Code] section 3426.3, subdivision (b)." (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1299-1300.) In this case, however, plaintiff did not ask the trial court to award reasonable royalties.

Court concludes that there is no ‘material distinction’ between the targeted claims and Plaintiff’s misappropriation of trade secrets claim. For the most part the targeted claims fail to independently plead any facts at all, but incorporate prior allegations by reference and/or refer to the ‘aforesaid conduct.’ To the extent they are supported by facts, it is the same nucleus of facts that gives rise to the misappropriation claim.”

Plaintiff revisited the issue at trial. Its opening brief to us explains: “At the close of its case, [plaintiff] brought a motion to amend. At that point, [plaintiff] had introduced evidence that Foust (while still employed at [plaintiff]) had deliberately delayed starting one of the projects, known as the Vault, in order to take that project with him when he left for South Bay. [Plaintiff] thus made an oral motion to amend to conform to proof. [Plaintiff] sought to include a breach of fiduciary duty claim against Foust, based on these additional facts, which differed entirely from any alleged use of confidential or trade secret information.” Plaintiff later details: “At trial, however, [plaintiff] learned for the first time that Mejia had been prepared to sign a contract with [plaintiff] as of March 8 and that Foust had avoided Mejia for several weeks while planning his move to South Bay.”

The trial court denied the motion for the same reason it sustained Foust’s demurrer.⁴ It explained: “[T]he trade secret information that Mr. Foust had was what would have prompted him to want to delay Mr. Mejia from entering into a contract with [plaintiff] because if your theory holds true, it was Mr. Foust who wanted to delay it long enough so that he could take the project with him because of the information he had garnered as the project manager for Mr. Mejia’s project while he was in the employ of [plaintiff]. For that reason, it still seems to be based on the same nucleus of facts.”

⁴ The trial court also denied the motion on the ground that plaintiff had failed to seek reconsideration or appellate writ review of its earlier ruling.

The allowance of an amendment to conform to proof rests largely in the discretion of the trial court and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) “If there is no liability as a matter of law, leave to amend should not be granted.” (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1721; cf. *Atchison, T. & S. F. Ry. Co. v. Superior Oil Co.* (1966) 243 Cal.App.2d 289, 295-296 [no abuse of discretion in denying leave to amend after all evidence was in when request involved issues that were already before the jury].)

The UTSA “provides the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies ‘based upon misappropriation of a trade secret.’ ” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 236.) It supersedes “common law claims that are ‘based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.’ ” (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958.)

Plaintiff reiterates its “foot-dragging” argument as follows: “Defendants’ misappropriation and the delay of the Vault contract are not part of the same nucleus of facts. The misappropriation involved the wrongful acquisition and use of [plaintiff’s] trade secret information. [Plaintiff’s] breach of fiduciary duty claim against Foust is based on Foust’s status as a key employee of [plaintiff] and his actions in preventing the Vault owners from entering into a contract with [plaintiff]. That claim does not presume, or require, that Foust used [plaintiff’s] confidential or trade secret information. Nor was Foust necessarily motivated by information he garnered as [plaintiff’s] employee. He delayed the Vault contract so that South Bay could acquire the project.”

Plaintiff’s analysis is erroneous.

A fair interpretation of plaintiff’s theory is that Foust used his position to gain the Vault project for his benefit rather than used plaintiff’s trade secrets to gain the Vault project for his benefit. Though the theory in the abstract does not depend upon using

plaintiff's confidential or trade-secret information, the theory according to the trial facts does depend on misappropriation. Plaintiff admits as much throughout its various arguments.

For example, in its motion for judgment notwithstanding the verdict, plaintiff urges that the project owners other than Borelli testified that their decision to leave plaintiff and contract with South Bay depended upon the undisputed facts that South Bay had the ability to "commence construction without delay" and "match [plaintiff's] budget proposals." According to plaintiff, "The evidence was compelling and without conflict that defendants used [plaintiff's] trade secrets to satisfy the owners' requirements." Plaintiff then explains: "Thus, there was more than one 'cause' for these owners leaving [plaintiff]--a nontortious cause (the owners' preference to follow Mr. Foust) and a tortious one (Mr. Foust's misappropriation)."

From this, the conclusion is inescapable that Foust's foot-dragging, by itself, did not cause plaintiff to lose the Vault project. This follows because one could reason that Foust foot-dragged the Vault project for a nontortious reason--he was being fired and Mejia preferred to follow him to South Bay. To find that Foust's foot-dragging caused plaintiff to lose the Vault project, a jury would have to find that Foust foot-dragged the Vault project for a tortious reason--Foust was being fired and used the trade secrets to persuade Mejia to follow him to South Bay. In other words, under the proffered breach-of-fiduciary-duty theory, plaintiff could not prove the element of causation without proving misappropriation. As such, the breach-of-fiduciary-duty claim is based upon the misappropriation of the trade secrets. It is therefore superseded by the misappropriation claim. Because there is no liability under substantive law, the trial court properly denied plaintiff's motion to amend.

Even if we suppose error in the denial of plaintiff's motion, the error is harmless because it is not reasonably probable that a result more favorable to plaintiff would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

As plaintiff concedes, the jury likely reasoned that Foust’s misappropriation did not cause lost profits because plaintiff “would have lost the projects anyway.” In addition, the jury also returned a verdict for Foust on a breach of contract cause of action grounded upon a promise in Foust’s employment contract to refrain from using plaintiff’s confidential information. As to this verdict, the jury found that Foust did “something the contract prohibited him from doing” but plaintiff did not “lose profits or marketing opportunities by those actions.” For this verdict, the jury also likely reasoned that Foust’s breach of contract did not cause lost profits because plaintiff would have lost the projects anyway. Thus, had the jury been asked to return a verdict on plaintiff’s breach-of-fiduciary-duty theory and had it found that Foust’s foot-dragging was a breach, the jury would necessarily reason that the foot-dragging did not cause lost profits because plaintiff would have lost the Vault project anyway. To reason otherwise would be inconsistent with the other two verdicts. It is not reasonably probable that the jury would have returned inconsistent verdicts.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Duffy, J.